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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1873

KONRAD S. URI, PER NYMARK, ARNOLD RASMUSSEN, RONALD BEIRNES, BORGE H. MANNES, CARL PEROVICH, BJORN NYMARK, SVERRE A. YRI, OLI HENDRICKS, SIGMUND ANDREASSEN, CORY A. KALDESTAD, MICHAEL LYNCH, JR., LARS MYHRE, THOMAS HAUGAN and EMIL VINBERG,

Appellants,

vs.

STATE OF ALASKA,

Appellee.

On Appeal from the Supreme Court of the State of Alaska

MOTION TO DISMISS

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Appellants,

vs.

STATE OF ALASKA,
Appellee.

On Appeal from the Supreme Court of the State of Alaska

MOTION TO DISMISS

Pursuant to Rule 16 of the Rules of the Supreme Court, appellee, State of Alaska, respectfully moves that the appeal be dismissed on the grounds that it is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules.

STATEMENT OF THE CASE

Appellee cannot agree with the characterization of the case which the appellants have offered in hopes of demonstrating the jurisdiction of this court,[1] nor can their general statement of the case be accepted.[2]

Alaska has prohibited the taking of fish and shellfish beyond its three-mile limit since at least 1960 when during the second session of the first Alaska State Legislature it passed Chapter 121, SLA 1960, Alaska Statutes 16.10.180-220[3] authorizing the Alaska Board of Fish and Game to establish and regulate areas adjacent to state territorial waters in which migratory fish and shellfish were found. The purpose of this statute is expressed in the legislative findings which it contains.[4] The Alaska Legislature acted in recognition of the facts[5] that species of fish and shellfish found within these adjacent areas are indistinguishable from fish and shellfish within state territorial waters and migrate to and from state territorial waters, and that in order to preserve and protect the state's fishery resources within the state's territorial waters, it is necessary to regulate certain fishing beyond them.

In 1969 the Alaska Board of Fish and Game extended its regulatory efforts into the then pioneer Ber-

[1]Appellants' Jurisdictional Statement 2.

[2]Appellants' Jurisdictional Statement 14.

[3]See Appellants' Jurisdictional Statement App. F. 24-26.

[4]Alaska Statute 16.10.180.

[5]*Compare* Toomer v. Witsell, 334 U.S. 385, (1948); Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, (1936); Silz v. Hesterberg, 211 U.S. 31 (1908).

ing Sea shellfish fishery. In that year it established the area described by appellants[6] and established a series of regulations setting seasons, size limits, and standards for gear. These regulations were originally challenged by a group composed of the same class, if not the same persons, as appellants, known as the North Pacific Vessel Owners Association in the United States District Court for Alaska.[7] The action was dismissed in June 1970.

In 1973 the Alaska Board of Fish and Game established a maximum quota of 23,000,000 pounds of crab for the Bering Sea area.[8] This regulation was promulgated at the urging of experts speaking on behalf of the National Marine Fisheries Service of the U.S. Department of Commerce.[9] The Bering Sea Shellfish Area quota of 23,000,000 pounds was reached on September 9, 1973, whereupon, the season was closed to crab fishing until June 25, 1974.

In December of 1973, the State of Alaska filed a seven count criminal complaint in the Alaska Superior Court alleging that Charles Bundrant had violated the fishing regulations and statutes in October 1973 by taking crab during the closed period in an area beyond three miles of St. Paul Island, Alaska, and thereafter bringing said crab within state territorial waters. *State v. Charles Bundrant,* No. 2295.

[6]Appellants' Jurisdictional Statement 14.

[7]North Pacific Vessel Owners Ass'n. v. Noerenberg, U.S. District Court for the District of Alaska, No. J-9-70.

[8]5 AAC 07.760; Appellants' Jurisdictional Statement App. F. 27.

[9]State v. Bundrant, 546 P.2d 530, 540 (Ak. 1976).

That same month, three crab fishermen, one of whom is an appellant herein, brought suit in the United States District Court in Alaska to enjoin the state from enforcing the fishing laws under which Bundrant had been charged. A three-judge district court heard the case and on April 30, 1974, entered a preliminary injunction against the state preventing the enforcement of those regulations. *Hjelle v. Brooks,* 377 F. Supp. 430 (D. Alaska 1974). The District Court did not declare that the State of Alaska was constitutionally powerless to regulate fishing for king crab in the Bering Sea beyond its three-mile limit, but only held that, upon a preliminary analysis of an incomplete record, there were grounds to suspect that Alaska's regulations infringed upon the plaintiffs' rights to due process of law and ran afoul of the implied limitation on state power emanating from the Commerce Clause of the United States Constitution. If carefully written to serve legitimate local goals, said the court, such laws might well "pass constitutional muster." *Hjelle v. Brooks, supra* at 441.

Accordingly, on June 15, 1974, the Alaska Board of Fish and Game adopted new regulations conforming with the guidelines established by the District Court in *Hjelle v. Brooks, supra.* The plaintiffs in *Hjelle* applied to the District Court for an injunction against the enforcement of these new regulations, but the Court denied their application in June, 1974. In an opinion dated June 11, 1976, following an August 1975 trial, the District Court explained that it had refused to enjoin enforcement of the new regulations because

of their apparent validity under the guidelines of the Court's earlier opinion.[10]

Under the new regulations, the commercial crab fishing season in the Bering Sea had been scheduled to open on July 1, 1974. However, prior to July 1, a private, *ad hoc* organization, constituted of the many fishermen who have taken this appeal, as well as other fishermen and processors, which called itself the "Shellfish Conservation Institute" had promulgated its own "rules" for the upcoming Bering Sea season. Those "rules" represented a wholesale defiance of the State's new regulations, with which the district court had declined the occasion to interfere, for they proclaimed that the season would open on June 26, 1974. In fact, even before that date surveillance flights detected a large number of vessels engaged in crab fishing in the Bering Sea. In response to this blatant repudiation of state sovereign authority, the Alaska Board of Fish and Game on June 25, 1974, issued an emergency regulation postponing the opening of the season and empowering the Alaska Commissioner of Fish and Game to open the season when "general order can be restored and the state can be assured that fishing will be conducted in a manner which will not jeopardize the rights of law abiding fishermen."[11]

The illegal fishing activities which prompted the criminal charges in these cases occurred between June

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[10]Opinion, n. 3, Appendix A herein.

[11]State v. Bundrant, *supra* at 534.

30, 1974, and July 24, 1974.[12] Additionally, appellant Kaldestad was charged with possession within the state of shellfish taken illegally outside the State.[13]

Meanwhile, the defendant in *State v. Bundrant,* No. 2295, had moved for dismissal of the charges against him in the Alaska Superior Court upon a stipulation of facts. That court granted Bundrant's motion to dismiss on September 10, 1974, and the State appealed.

Appellants herein also made motions in the Alaska Superior Court to dismiss their cases on numerous grounds, including (1) lack of jurisdiction, (2) unconstitutional vagueness of the regulations, and (3) illegality of the search of their crab pots.[14] Unlike defendant Bundrant, however, appellants herein did not stipulate to any facts, and these issues remain very much alive as a result.[15]

On December 17, 1974, the Superior Court dismissed the State's complaint against appellants on the sole basis that the regulations in question had intruded upon an area of exclusive federal jurisdiction established by the Outer Continental Shelf Lands Act, 43 U.S.C. §§1331-1343, and were consequently prohibited by article VI of the Constitution of the United

[12] *Id.*, at 535.

[13] *Id.*, at 536.

[14] *Id.*, at 535.

[15] State v. Bundrant, 547 P.2d 838 (Alaska 1976) (order denying petition for rehearing).

States.[16] That ruling was also appealed to the Alaska Supreme Court by the State.[17]

Subsequently, the cases against defendant Bundrant and appellants herein were consolidated for purposes of appeal. On January 19, 1976, the Alaska Supreme Court reversed the decisions of the Alaska Superior Court and remanded the cases to that court for further consideration in conformity with its opinion.[18] On March 26, 1976, rehearing was denied by the Alaska Supreme Court. Again, the court emphasized the right of appellants herein to present for decision those defenses which had not previously been decided by the Superior Court.[19]

Appellants filed their notice of appeal to this Court on May 10, 1976. On May 26, 1976, on appellants' motion, the Alaska Supreme Court stayed the trials in these cases pending disposition of appellants' appeal to this Court.[20]

[16] State v. Bundrant, 546 P.2d at 535.

[17] Appellants' suggestion in their Jurisdictional Statement at 17, that thereafter both houses of the Alaska Legislature passed a resolution condemning the actions of appellants is totally misleading. The resolution was not so much a condemnation of appellants as it was a directive to enforce and defend the crab fishing laws to the extent constitutionally permissible.

[18] State v. Bundrant, 546 P.2d at 556.

[19] State v. Bundrant, 547 P.2d 838, 839 (Alaska 1976). On June 30, 1976, defendant Bundrant pleaded nolo contendere in the Alaska Superior Court. The plea (and conviction and fine) was subject to a condition that it be expunged (and the fine remitted) if the challenged fishing laws were struck down by this court. Thus, the only case in which there are facts of record is not before this court.

[20] Appellants' Jurisdictional Statement, App. J. Appendix A herein.

On June 11, 1976, the United States District Court filed its opinion in *Hjelle v. Brooks, supra,* dismissing the action therein.[21]

Nothing is "final" about the Alaska Supreme Court's disposition of these cases except the Court's holding that regulation of the Alaska king crab fishery is not preempted by the Outer Continental Shelf Lands Act and that some state regulation of fishing beyond the so-called three-mile limit is not forbidden *per se.*

Remaining in dispute are the issues of whether (1) whether the State's regulation of the Alaska crab fishery is an undue burden on interstate commerce (2) whether it interferes with the United State's plenary authority over the conduct of foreign commerce[22] and foreign relations,[23] and (3) whether the State of Alaska has in fact sufficient interest or "nexus" to the Alaska king crab fishery in the Bering Sea and particularly in the area in which appellants were fishing or to appellants themselves to permit the regulation of their conduct in accordance with the requirements of due process.[24] Also remaining for decision by the Superior Court are those federal and state questions to which neither the Alaska Superior or Supreme Court have spoken, the vagueness of the regulations and the alleged unreasonable search of appellants' crab pots.

[21]This opinion may be found in Appendix A herein. Plaintiffs in Hjelle v. Brooks have moved that court for reconsideration, and a ruling on that motion is imminent.

[22]United States Constitution, article I, section 8.

[23]United States Constitution, article I, section 8, article II, section 1, article VI.

[24]United States Constitution, amendment V, amendment XIV.

Resolution of these issues must necessarily await the making of an evidentiary record.

Moreover, the appellants continue to deny that they even engaged in the conduct upon which the criminal charges are based, and they may raise other affirmative defenses at the trials of these cases.

Finally, and most significantly, on April 13, 1976, the Fishery Conservation and Management Act, 16 U.S.C. §§1801-1882, became law, and the United States, for the first time, has now undertaken to conserve and manage the fishery involved herein, 16 U.S.C. §1812, effective as of March 1, 1977. 16 U.S.C. §1811, n.

ARGUMENT

THIS APPEAL IS NOT WITHIN THE JURISDICTION OF THE COURT

I.

SUMMARY OF ARGUMENT

This appeal[25] is taken pursuant to Title 28, United States Code, section 1257. Appellants' Jurisdiction Statement 1. However, the sections relied upon by appellants only provide for review of "final judgments or decrees rendered by the highest court of a state in which a decision could be had . . ." 28 U.S.C. §1257.

This court has had an opportunity to interpret the final judgment requirement of 28 U.S.C. §1257 and on several occasions has said the requirement "is not one of those technicalities to be easily scorned. It is an

[25]In the alternative appellants petition this court for a writ of certiorari pursuant to 28 U.S.C. §2103.

important factor in the smooth working of our federal system." *Radio Station WOW v. Johnson,* 326 U.S. 120, 124 (1944); *Montgomery Bldg. & Construction Trades Council v. Ledbetter Erection Co., Inc.,* 344 U.S. 178, 180 (1952). This court has recognized as the basis for its interpretation, the general consideration of good judicial administration, the mischief of economic waste and of delayed justice occasioned by review of intermediate rulings, and the added consideration of minimizing the potential conflicts between the courts of two different governments. *Radio Station WOW v. Johnson,* 326 U.S. 120, 124 (1945). Moreover, appellants have the burden of affirmatively establishing this court's jurisdiction. *Memphis v. Natural Gas Co. v. Beeter,* 315 U.S. 649 (1942).

The decision of the Alaska Supreme Court remanded the cases to the Alaska Superior Court to consider other grounds for dismissal raised by appellants. Presumably, if those motions are unsuccessful, the cases will be set for trial.[26] Traditionally, in its present posture, the decision of the Alaska Supreme Court is not a final judgment. *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62 (1948).

Since this court's decision in *Radio Station WOW v. Johnson, supra,* however, this court has accepted jurisdiction in situations in which the highest court of a state has finally determined the federal issue presented in a particular case, but in which there are further proceedings in the lower state courts to come. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 477 (1975).

[26]Appellant's Jurisdictional Statement 4, n. 1.

In *Cox Broadcasting Corp. v. Cohn, supra,* at 477-485 this court enumerated four categories of such cases in which this court has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state court, noting as it did so that:

> In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.' *Id.,* at 484.

The four categories of cases are as follows:

1. Those cases in which "the case is for all practical purposes concluded," the outcome is "preordained." That is, when there is "no defense other than his federal claim." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 479 (1975).

2. Those cases where "the federal issue, finally decided by the highest court in the State, will survive" the lower court proceedings, and the other issues to be decided below, " 'could not remotely give rise to a federal question . . . that may later come here . . . .' " *Id.,* at 480.

3. Those cases "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.,* at 481.

4. Those cases "in which the party seeking review might prevail on the merits on non-federal grounds"

and where "the state court decision might seriously erode federal policy". *Id.*, at 482-483.

II.

POSTURE OF THE CASE

As characterized by the Alaska Supreme Court, the propriety of the state's regulation of the king crab fishery beyond the three-mile limit in the area in question turned upon an analysis of two main issues.

The first issue, entitled generally "Federal Exclusivity and Federal Pre-Emption," *State v. Bundrant, supra,* at 537, dealt with a number of lesser issues resolving questions of whether Alaska's regulations were an interference with the exclusive federal domain of the regulation of interstate and foreign commerce, the management of foreign relations, or were in conflict with federal law, specifically the Outer Continental Shelf Lands Act, 43 U.S.C. §1331-1343, and certain treaties. In reaching its decision the Alaska Supreme Court was required to make certain factual determinations and assume others on the basis of a scant record and general knowledge allowing the court to determine that the state's regulations neither discriminated against nor burdened interstate commerce, nor intruded upon an area of foreign affairs. *State v. Bundrant, supra,* at 537-48.

The second issue dealt with by the Alaska Supreme Court was entitled "State Fisheries Jurisdiction," *State v. Bundrant, supra,* at 548, and dealt with the

extent or reach of Alaska's law beyond the territorial sea within the confines of due process. *State v. Bundrant, supra,* at 548-54. As viewed by the Alaska Supreme Court, the extent of the state's authority to regulate is determined by its interest or "nexus" to the fishery to be regulated. Again based upon a record which consisted of nothing more than a set of stipulations agreed to by Bundrant (who is not an appellant herein) for the purpose of deciding his motions and the state's offer to prove similar facts in the cases of *Uri, et al.,* and Kaldestad, the Alaska Supreme Court found that those facts, if proven, constituted sufficient interest or "nexus" between the State and the fishery.

It is essential to the consideration of the finality of the Alaska Supreme Court's decision to keep in mind that the case before it involved essentially two different classes of appellants. In the case of *State v. Charles Bundrant,* Alaska Supreme Court No. 2295, there existed before the court a stipulation of facts which the parties had agreed would control the legal issues before the courts. *State v. Bundrant, supra,* at 534. In that case the superior court had granted Bundrant's motion to dismiss as applied to the facts in that stipulation and accordingly all of the issues which the Alaska Supreme Court spoke to in its opinion were before it in that case. Appellants however, presented a second class of cases to the Alaska Supreme Court. Appellants did not enter into a stipulation of facts. In arguing the matter to the Alaska Superior Court, the State of Alaska was only permitted to make an offer of proof that there existed sim-

ilar facts to those agreed to in *State v. Charles Bundrant,* No. 2295. *State v. Bundrant, supra* at 535. Additionally, some evidence was before the Alaska Supreme Court in the form of judicially noticeable facts and portions of unsigned depositions which the appellants had attached to their motion to dismiss. *State v. Bundrant,* 547 P.2d 838 (Alaska, 1976) (on rehearing). Appellants' arguments included the same federal constitutional issues raised by *State v. Charles Bundrant,* No. 2295, requiring determinations of fact; i.e., the burden upon interstate and foreign commerce, the intrusion upon foreign affairs, and the lack of a nexus between the State and the fishery resulting in violations of appellants' due process rights. Unlike the Alaska Superior Court in *State v. Charles Bundrant,* No. 2295, however, the Alaska Superior Court here ruled upon only one of appellants' arguments, specifically that the regulations under which they were charged intruded upon, and were in conflict with an area of exclusive federal jurisdiction established by the Outer Continental Shelf Lands Act, 43 U.S.C. §§1331-1343, and were consequently prohibited by article VI of the Constitution of the United States. Nor did the Alaska Superior Court make factual findings necessary to finally resolve the other issues raised by appellants. Accordingly, though the Alaska Supreme Court ruled upon numerous federal issues raised by appellants, its rulings as applied to the *facts* dealt only with facts established in *State v. Charles Bundrant,* No. 2295. As to appellants, the court's decision except as to the legal issue of whether the state regulations conflict with the Outer Continental Shelf

Lands Act, and possibly the further legal conclusion that some state regulation of fishing beyond the state's three-mile limit is not forbidden *per se,* is based on no more than the state's offer of proof which the appellants maintain they strongly contest. To demonstrate the degree to which the appellants contest the state's offer of proof in this matter, this court need only review appellants' petition for rehearing filed to the Alaska Supreme Court (R. 387-89). There appellants claimed that this court's opinion was based upon "material factual assumptions" which "are strongly disputed" by all of the appellants. (R. 387).

On rehearing, the Alaska Supreme Court clarified further its already clear pronouncement in its first opinion[27] and stated:

> In any event, appellees have not been precluded from raising specific defenses based on matters not previously determined by the trial courts. *State v. Bundrant,* 547 P.2d 838, 839.

Accordingly, many issues raised and answered by the Alaska Supreme Court in the opinion as to *State v. Charles Bundrant,* No. 2295 below, remain to be answered as to appellants only after a hearing of the facts by the Alaska Superior Court below.

Also remaining for decision by the Alaska Superior Court are those questions to which neither it nor the Alaska Supreme Court have spoken, the vagueness of

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[27]"By virtue of our decision herein, we do not pass on other legal arguments advanced by appellees. The decision of the trial court was based on the doctrine of federal pre-emption and did not consider other grounds for dismissal. Clearly these arguments may be renewed in the trial court." State v. Bundrant, 546 P.2d 530, 556 n. 108.

the regulation and the alleged unreasonable search of appellants' crab pots.[28]

III

THE DECISION OF THE ALASKA SUPREME COURT IS NOT A FINAL JUDGMENT

As this court noted at the outset of its opinion in *Cox Broadcasting Corp. v. Cohn, supra,* at 477-478, in most if not all of those interlocutory state court decisions of which it accepted jurisdiction, the further state court proceedings would not require the decision of other federal questions that might also require review by this court at a later date.

Appellants cite only one case which they claim supports their position that an interlocutory decision which leaves open further state court decisions on other federal questions, may be a final judgment.[29] *Hudson Distributors v. Lilly,* 377 U.S. 386 (1964). *Hudson* is, of course, the one case which could have prompted the "in most if not all" language in *Cox Broadcasting Corp. v. Cohn, supra.* As Mr. Justice Harlan pointed out in dissent in *Hudson Distributors v. Lilly, supra* at 500-01, this court gave no explanation at all in that case for its departure from its established principles. Mr. Justice Harlan suggested that the reason for this departure was due to the fact

[28]Appellants themselves recognize that the federal issue of the vagueness of the regulations remains open for consideration. Appellants' Jurisdictional Statement 7, n. 6.

[29]Appellants' Jurisdictional Statement 7, n.6.

that the jurisdictional question was not called to the court's attention by a motion to dismiss raising the issue. Mr. Justice Harlan also pointed out that the exceptions (the four categories in *Cox)* all involved intermediate rulings having "serious public consequences". *Id.,* at 397. *Hudson,* like the instant case, does not meet that test.

Clearly even if this court has on one occasion accepted jurisdiction over a decision which leaves open for decision other federal questions, it will not do so "in most" cases. *Cox Broadcasting Corp. v. Cohn, supra* at 477-78.

Appellants claim[30] that this case comes within both the third and fourth categories of cases described in *Cox Broadcasting* in which this court has determined that a judgment is final though something further remains to be litigated.[31]

This court described the third category in *Cox Broadcasting* as consisting of those cases "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* This cate-

[30]Appellants' Jurisdiction Statement 8-9.

[31]Clearly this case does not come within the first category set forth in Cox Broadcasting Corp. It does not involve a case in which there are further proceedings yet to occur in state court but on which the federal issue is conclusive or the outcome pre-ordained. 420 U.S. 479. The federal issue decided by the Alaska Supreme Court is not conclusive on the outcome of this litigation and the outcome of the proceedings below are certainly not pre-ordained.

Similarly, this case does not come within the second category of cases in Cox Broadcasting Corp. There simply can be no question but that there are other federal issues to be decided below which may later come here.

gory consists of cases in which there are no other federal issues and the highest state court has finally decided the single federal issue. *See North Dakota Pharmacy Bd. v. Snyder's Store,* 414 U.S. 156, 163 (1973). But where, as here, there are a abundance of other federal issues, and where, as here, the State may appeal from an adverse ruling on those issues, *State v. Browder,* 486 P.2d 925 (Alaska 1971), the rule from those cases simply does not apply. At any event, if the appellants do prevail on the other federal issues (and the State takes no appeal), the State must either abandon the fishing laws in issue (thereby rendering the Alaska Supreme Court's ruling on preemption—the issue on appeal here—nugatory and of no actual force or effect) or enforce them in another mode, which would then result in the federal issue being brought here. In plain fact, either the State must abandon its laws (in which case, there will be no federal issue) or most certainly "later review of the federal issue" will be had.

Nor does this case come within the fourth category of exceptions described in *Cox Broadcasting.* That category consists of those cases (1) where the party seeking review might prevail on the merits below, (2) where the reversal of the State court's ruling on the federal issue would preclude further litigation on the cause, *and* (3) where "a refusal immediately to review the state court decision might seriously erode federal policy . . . ." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 482-483. First, the cases in this category are those in which there is only a single federal issue. Second, they involve state court decisions which will seriously erode (or interfere with) established federal policy. While much has been said to the effect that the decision below and the fishing laws in issue do just that, in plain fact they do not.

In *State v. Bundrant,* 546 P.2d 530, 558-559 (Alaska 1976), Mr. Justice Rabinowitz (concurring) said:

> In summary, therefore, the landing law cases emanating from *Silz v. Hesterberg,* 211 U.S. 31 (1908), authorize the State's prosecution of appellees Bundrant and Kaldestad under count IV. The prosecution of appellee Vinberg is unquestionably authorized by *Skiriotes v. Florida, supra.* Under the broader principle governing the extraterritorial application of criminal laws, manifested in part in *Skiriotes,* the remaining appellees in *Uri et al.* and appellee Kaldestad may also be prosecuted for their conduct. Justice Erwin and I break new ground, if at all, only in expressly recognizing that broader principle.

Because this holding and the holding that Alaska's regulation of the fishery was "entirely compatible with the federal constitution and existing federal legislation" *(id.,* at 556) were the only holdings in which a majority concurred, they constitute the law of the case. It is difficult to see how such a decision might "seriously erode" federal policy.

The decision does not chill a free press, misapply the Equal Protection Clause, interfere with federal regulation of labor relations, misapply federal trade laws, interfere with federal regulation of communications, or otherwise erode federal policy. It simply ap-

plies well established federal doctrines to what until now has been a void in the conservation of important fishery resources. The decision (and Alaska's regulation) eschews any control whatsoever over foreign nationals. No claim is laid to any resource claimed by the United States. All that is done is to protect a vital resource (and dependent economy) by reasonable regulation of Alaskan fishermen and fishermen from neighboring States. There is no hint of discrimination against nonresidents.

If the exceptions analyzed in *Cox Broadcasting* have a common factor it is precisely that the decisions being reviewed posed "serious public consequences" or "seriously erode federal policy." The decision in the instant case does neither, nor can it do so in future. Congress has filled the void by adopting the Fishery Conservation and Management Act. 16 U.S.C. §§1801-1882. Alaska's stop-gap efforts to protect an important fishery resource will expire in the immediate future, to be replaced by a federal-state cooperative program. 16 U.S.C. §1852(7).

While appellants suggest that the contested regulations go beyond the 200-mile limit adopted by this Act, and therefore, beyond its coverage, Jurisdictional Statement 8, there is nothing of record to indicate that Alaska has enforced or will enforce them beyond that limit. In any event, interlocking circles with diameters of 200 miles may be drawn about Alaska's coast and offshore islands so as to cover the entire eastern Bering Sea, i.e., that portion of the sea open to American fishing and closed to Russian fishing.

Jurisdictional Statement, App. F. 19. (U.S. Soviet Treaty on Fishing for Crab). Accordingly, there is no reason to assume that Alaska's regulations exceed the coverage of the new Act or speculate that they might be applied to do so. And as we will show, the Act itself provides a mechanism for preventing any State from acting contrary to federal policy.

In the meantime, it can hardly be suggested that the State's regulation or the decision below will erode the federal policy announced in the new Act. The Act does not preclude extraterritorial regulation of fishing by vessels which are registered in Alaska. 16 U.S.C. §1856 (a). Bundrant's vessel was registered in Alaska. *State v. Bundrant,* 546 P.2d 530, 534-535 (Alaska 1976). There are no facts of record concerning appellant's vessels, but it may be assumed that they, like Bundrant, followed the law requiring that commercial fishing vessels be licensed to fish or land fish in Alaska. They were not charged with its violation. *Id.*

The pertinent law, Alaska Statute 16.05.490(a), reads:

> *Vessel license.* (a) As a condition to delivery or landing of fish or engaging in commercial fishing in the State, a license is required for a commercial vessel, including a vessel used in charter service for the recreational taking of fish and shellfish.

In sum, the decision is in no significant way hostile to any federal policy, and it is entirely consistent with announced federal policy. That being so, the rule from *Cox Broadcasting* simply does not apply.

Appellants appear to urge this court to adopt yet another category or at least a subcategory not enumerated in *Cox Broadcasting,* that is, if the United States files an amicus brief before a state supreme court in a controversy that may have an incidental effect on some United States policy and the state court fails to adopt every point in the United States' position[32] or if a three judge panel of the United States District Court has preliminarily enjoined different state regulations involving the same general issue,[33] then this court should take jurisdiction even though the litigation is still in its preliminary stages. The argument is not supported by authority or reason.

Nor is appellants' argument bolstered by the fact that in reaching its decision the Alaska Supreme Court agreed with the ruling but not completely with the legislative analysis[34] of one United States Court of Appeals ruling. *United States v. Ray,* 423 F.2d 16 (5th Cir. 1970). The decision in issue certainly does not contradict the holding in *Ray* that the United States has the exclusive right to explore and exploit coral reefs as part of the outer-continental shelf. In reality no federal-state conflict exists in this case.

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[32]Here of course the United States' main concern in its amicus brief was in assuring that Alaska's regulations not be applied to foreign nationals, a point resolved at the outset by the State of Alaska's acceptance of it. State v. Bundrant, supra at 540; Hjelle v. Brooks, *supra* at 438.

[33]See State v. Bundrant, *supra* at 547.

[34]Contrary to appellants' assertions, Appellants' Jurisdictional Statement 10, the Alaska Supreme Court did not refuse to follow the reasoning of the United States District Court at the pages cited by appellant. It simply disagreed with that court on the meaning of state laws since repealed and not part of this case.

If this court were to consider noting probable jurisdiction in this case, it would likely conclude that it would be the least appropriate case in which to expand those categories of final judgments enumerated in *Cox Broadcasting Corp. v. Cohn, supra.*[35]

Of foremost concern in this court's consideration should be the undesirability of interfering with a good faith state criminal prosecution at this incipient stage of the litigation. Aside from the general principles of federalism and comity which apply to all civil proceedings, a federal court's decision to intervene in a good faith state criminal prosecution strikes at the very heart of our federal system. *Compare, Younger v. Harris,* 401 U.S. 37 (1971); *Samuels v. Mackell,* 401 U.S. 66 (1971); *Steffel v. Thompson,* 415 U.S. 452 (1974). Of all of the cases in which this court has accepted review of interlocutory appellate orders, appellee is aware of only two which involved criminal proceedings, *Mills v. Alabama,* 384 U.S. 214 (1966) and

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[35]Appellants' reliance upon this court's notation of probable jurisdiction in Douglas v. Sea Coast Products, Inc., No. 75-1255 ..... U.S. ....., 96 S.Ct. 1723 (1976) is misplaced. An analysis of the issues in Douglas v. Sea Coast Products, Inc., reveals that the challenged state statute there allegedly discriminates against fishing by resident aliens in direct contradiction to this court's decision in Takahashi v. Fish Commission, 334 U.S. 410 (1948).

On the other hand, the Alaska court has said of the laws with which these appellants are charged:

> Moreover, there is absolutely nothing to suggest that these regulations are either by their terms or in their enforcement, discriminatory against non-Alaskans. State v. Bundrant, *supra* at 540.

More importantly appellants completely disregard the fact that this court noted jurisdiction in Douglas v. Sea Coast Products, Inc., pursuant to 28 U.S.C. §1253 which provides for a direct appeal to this court from a decision of a three judge United States District Court enjoining the enforcement of a state statute.

Harris v. Washington, 404 U.S. 55 (1971). In *Mills,* it was conceded that nothing remained to be tried below, and in *Harris,* it was the trial itself that violated the United States Constitution. Moreover, here, a three judge panel of the United States District Court has reviewed the state's laws and the prosecutions thereunder, and while granting a preliminary injunction against the laws as they were originally worded, has refused to grant preliminary relief to the laws as rewritten. And after an extensive analysis of the matter, including a complete evidentiary hearing, that court declined to interfere with the enforcement of these state laws, evidently holding the view that the State of Alaska had apparently complied with the court's suggestion as to how the state might accomplish its regulatory objectives.[36] Circuit Judge Wright's concurring opinion indicates that the state's actions are in all manner proper and in good faith. It can hardly be argued in the face of Judge Wright's conclusion that the state has not made a conscientious effort to tailor its regulations to the language of that court's prior opinion.

Moreover, intervention by this court at this stage of this litigation could seriously hamper the outcome of these state court criminal trials. Over two years have passed since the state filed its charges in these matters while appellants' motions were ruled on by the Alaska Superior Court and appealed to the Alaska Supreme Court. During the further passage of time that this court may require in resolving the legal is-

[36]Appendix A herein.

sues now raised, the State of Alaska's ability to prove that the appellants even committed the acts with which they are charged could be seriously jeopardized.[37]

As this court noted in *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. 486 n. 13, in response to Mr. Justice Rehnquist's dissent, in determining whether a decision comes within the fourth category of final judgments enumerated in that opinion, this court will make a limited consideration of the merits of the case to determine whether an issue is substantial and the state court's decision is incorrect. This limited consideration presumably is similar to the consideration a United States District Court makes in determining whether to grant a preliminary injunction. *See Sierra Club v. Hickel,* 433 F.2d 24 (9th Cir. 1970), *aff'd.* 405 U.S. 727 (1972). The only issue before this court at this stage of the litigation is appellants' supremacy clause argument. In making a determination as to whether to grant a preliminary injunction on this very issue the three judge panel of the United States District Court for Alaska held:

> At this incipient stage of the litigation the Court does not conclude that plaintiffs are 'reasonably certain' to succeed ultimately on the basis of their supremacy clause argument. *Hjelle v. Brooks, supra,* at 438.

Furthermore, when the matter was finally briefed and after a trial on the merits in United States District Court, that same three judge panel held that Alaska's

[37]Trials in these matters have been stayed by the Alaska Supreme Court pending appeal to this Court. Appellants' Jurisdictional Statement, Appendix J.

new regulations seemed to be in compliance with the directions of their earlier opinion and that court was content to abstain from reviewing the challenged regulations which were before them on *all* federal issues which are to be litigated in this case.

Of course appellee does not urge this court that it is bound by a decision of a three judge panel of the United States District Court in deciding whether this court should assume jurisdiction. Nonetheless the district court did make a similar decision on not one but two occasions, the latest occasion occurring after extensive briefing and a trial on the merits and after the decision of the Alaska Supreme Court in *State v. Bundrant, supra.* Moreover, this decision by the United States District Court is one which it is most competent to make. Under these circumstances, this court should give great weight to the district court's determinations and refuse to note probable jurisdiction.

IV

THE ISSUES PRESENTED ARE NOT SO SUBSTANTIAL AS TO WARRANT A DEPARTURE FROM THE PRACTICE OF ONLY REVIEWING CASES UPON FINAL JUDGMENT.

If this court ever reaches the issue, and undertakes a limited review of the merits of this appeal in order to determine whether the issues here are substantial enough to place it within the fourth category of cases enumerated in *Cox Broadcasting Corp. v. Cohn,* it will conclude that the issues involved here do not justify this court in deviating from its practice of only reviewing final judgments.

In reviewing this court's language in *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. 487, n.13, it seems clear that the test of whether the issues presented meet the requirements of that exception are at least as difficult as meeting the considerations of a petition for certiorari.[38] Accordingly, and to avoid repetition, this part of appellee's argument is also made in opposition to appellants' request that if this court holds that it does not have jurisdiction pursuant to 28 U.S.C. §1257(2), it treat appellants' jurisdiction statement as a petition for a writ of certiorari under 28 U.S.C. §2103.

This court has affirmed that certiorari will issue, in the exercise of its discretion, only in cases of gravity and general importance and in order to secure uniformity of decision. *Magnum Import Co. v. Coty,* 262 U.S. 159 (1922); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251 (1915). As has previously been stated, the cases heretofore excepted under the fourth category in *Cox Broadcasting* have involved the authority of the tribunal to try a case or a first amendment violation.

With the foregoing propositions in mind the appellee shall, within the confines of a limited consideration of the merits, address appellants' legal arguments and demonstrate that they are insubstantial.

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[38] Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court. U.S. Sup. Ct. Rule 19, 28 U.S.C.

A. A state has power to regulate the conduct of United States nationals in a fishery occurring partially beyond its territorial limit in order to protect its interests in that fishery within its territorial limit.

The application of state law to the conduct of its fishermen beyond the state's territorial boundary in the absence of conflicting federal law is well settled. *Skiriotes v. Florida,* 313 U.S. 69 (1941); *Felton v. Hodges,* 374 F.2d 337 (5th Cir. 1967) *cert. denied,* 389 U.S. 971 (1967). *Skiriotes* was the first case to recognize this principle and the wisdom of that case has never been questioned. Appellants contend that, "*Skiriotes* has probably proven unwieldly in application to modern international fisheries and it can reasonably be predicated that it will be overruled." Appellants' Jurisdictional Statement 22. Appellants then go on to state that it may be unnecessary to overrule *Skiriotes* to reverse the Alaska Supreme Court below. However, appellants' point is irrelevant. If *Skiriotes* has become "unwieldly," the solution has already been provided by Congress in enacting the Fisheries Conservation and Management Act. In addition to the new Act and *Skiriotes* there is also *Toomer v. Witsell, supra. Toomer* followed this court's decision in *United States v. California,* 332 U.S. 19 (1947), and expressly reaffirmed the power of the states to regulate fishing despite the paramount powers of the United States in the marginal sea, in the absence of conflicting federal legislation. The Outer Continental Shelf Lands Act creates no greater bar to reasonable and nondiscriminatory state regulation of American fishermen in the waters over the shelf than did *United States v. California, supra.* The paramount rights with respect to fishing are the same there as they are in the marginal sea. And this principle underlies the recent decision by the United States Court of Appeals for the Fifth Circuit.[39] That court clearly could not have perceived the Outer Continental Shelf Lands Act as overruling *Skiriotes.*

Appellants' argument based upon the "tidelands cases," *United States v. California,* 332 U.S. 19 (1947); *United States v. Louisiana,* 339 U.S. 699 (1950); *United States v. Texas,* 339 U.S. 707 (1950), cannot survive this court's distinguishing in *Toomer* and *California* between the power of the state to regulate fishing, absent conflicting federal legislation, and the United States' "paramount rights" in and to the seabed or the waters.

Toomer involved nonresidents. *Skiriotes* and *Felton* involved residents. In adopting the Fisheries Conservation and Management Act, Congress made that distinction irrelevant, relying instead, and quite pragmatically, on the locus of vessel registration. 16 U.S.C. §1856. Bundrant (concerning whom there are facts of record) had registered his vessel in Alaska. *State v. Bundrant,* 546 P.2d 530, 534-535 (Alaska 1976). The appellants (concerning whom there are no facts of record) may be presumed to have done so in accordance with the requirements of Alaska Statutes 16.05.490 as they were not charged with the violation.

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[39]Felton v. Hodges, 374 F.2d 337 (5th Cir. 1967) *cert. denied,* 389 U.S. 971 (1962).

Id. Accordingly, in extending Skiriotes and Felton, if at all, the Alaska Supreme Court in these cases has done nothing more than Congress has done. Since the cases do not present a concrete factual situation involving the application of the regulations to those whose vessels are not registered in Alaska, it would be inappropriate for this court to consider it in the abstract. *Cf. Toomer v. Witsell, supra,* at 394.

For appellants to argue that Congress has not resolved the question is plainly incorrect. Even if the phrase "registered under the laws of such State" in 16 U.S.C. §1856(a) were ambiguous, Congress, in the very next subsection has cured the effect of any ambiguity. This is because 16 U.S.C. §1856(a) and (b) together read:

> (a) In general.—Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.
>
> (b) Exception.—(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of Title 5, that——
>
> (A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the fishery conservation zone and beyond such zone; and
>
> (B) any State has taken any action, or omitted to take any action, the results of which

> will substantially and adversely affect the carrying out of such fishery management plan;
>
> the Secretary shall promptly notify such State and the appropriate Counsel of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.
>
> (2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

Appellants are first to assert that the fishery involved in this case is predominately within the fishery conservation zone and beyond such zone, i.e., beyond the marginal sea. Jurisdictional Statement, at 16-17. That being so, if Alaska were to regulate the fishery adversely to the United States, the Secretary may oust Alaska altogether. It would be far better for the Secretary to make the determination of whether the vessels are subject to Alaska's regulations in the first instance than for this court to consider the issue in the abstract. At any event, and upon a proper record and following some administrative experience with the Act, this court will undoubtedly have an opportunity to examine its proper interpretation.

Appellants also recognize that adopting their arguments would cast serious doubt upon the validity of

another solid line of cases[40] upholding state "landing laws" which prohibit the possession of fish within state waters taken in violation of law beyond state waters. Appellants' Jurisdictional Statement 23. Considering the local and temporary nature of the regulations and of the decision below, there hardly seems grounds for doing so.

Finally, appellants' argument that this matter is one of "conflict" among lower state and federal courts is not correct. The Alaska Supreme Court was itself following a decision of the United States District Court[41] in reaching its decision. Numerous other lower state and federal court decisions are in accord with its holding. *Felton v. Hodges, supra; People v. Foretich,* 14 Cal. App. 3d Supp. 6, 92 Cal. Rptr. 481 (Cal. App. 1970); *Gherra v. California, Fish & Game Department,*[42] No. 47823 SAW (N.D. Cal. 1973); *Frach v. Schoetler,* 46 Wash. 2d 281, 280 P.2d 1038 (1955); *Johnson v. Gentry,* 220 Cal. 231, 30 P.2d 400 (1934); *Santa Cruz Oil Corp. v. Milnor,* 55 Cal. App. 2d 56, 130 P.2d 256 (1942).

B. Federal law does not preempt Alaska's power to regulate the Bering Sea King Crab Fishery.

Appellants' second argument simply consists of asserting that the provisions of the Outer Continental Shelf Lands Act 43 U.S.C. §1331-1343 establish not only the seabed but also fishing for the crab thereon

[40]Silz v. Hesterberg, 211 U.S. 31 (1908); Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1937).

[41]United States v. Thompson, (No. A-87-72 Cr., Dec. 15, 1972) unpublished opinion, see Record File 4.

[42]Unpublished opinion, see Record File 4.

lying beyond the state's territorial limits as an area and subject of exclusive federal regulation. Appellants' Jurisdictional Statement 23-27. Appellants however, cite no decision by this court or by any court in support of their argument.

On the other hand, the Outer Continental Shelf Lands Act distinctly provides:

> This subchapter shall be construed in such manner that the character as high seas of the waters *above* the outer continental shelf and the right to navigation and fishing therein shall not be affected.[43]

Admittedly there has never been a decision by this court speaking to precisely this issue, but simply because appellants have raised an argument never decided by this, or any court does not make it substantial. In *Guess v. Read,* 368 U.S. 957 (1961), this court refused to grant certiorari to a decision by a United States Court of Appeals[44] holding the clear meaning of this language to be that the exclusive provisions of the Outer Continental Shelf Lands Act do not apply to the waters above the shelf.

The legislative history behind the meaning of this passage is voluminous and was substantially briefed by both sides below.[45] Adequate support exists for the state's position that the exclusive federal regulatory provisions of the Outer Continental Shelf did not

[43]43 U.S.C. §1332(b). (emphasis added)

[44]Guess v. Read, 290 F.2d 622 (5th Cir. 1961). See also Hjelle v. Brooks, *supra,* at 430.

[45]Record File 4.

appertain to the regulation of fishing by citizens of the United States.[46]

The United States did acquire title or paramount rights with respect to foreign nationals to Alaska king crab as a sedentary species of the continental shelf pursuant to article II, section 4, of the 1958 Geneva Convention on the Continental Shelf[47]; however, the United States did not thereafter undertake to regulate this resource or to declare it to be within the exclusive domain of the federal government. This state of law continued until very recently when this absence of federal regulation, in part, prompted the passage of the Fishery Conservation and Management Act early this year.[48]

United States v. Ray, 423 F.2d 16 (5th Cir. 1970), relied upon by the appellants is not at all in conflict with the Alaska Supreme Court decision as that case involved a trespass and a claim against the title asserted by the United States and did not reach the question of whether state domestic law could be applied by a state to a United States citizen's fishing in the waters over the seabed. At any event, the rule from *Ray* is that no one may exploit the shelf's resources without the express consent of the United

[46]Sen. Re. No. 411, 83rd Cong., 1st Sess. (1953). See also remarks of Senator Douglas 99 Cong. Rec. at 2868 (1953);

> We are not particularly interested in kelp or shrimp or oysters, those are sideshows. The question is to oil and gas.

See also a discussion of this very provision of 43 U.S.C. §1332(b) by Senator Cordon (the bill's manager) expressly supporting the state's position. Hearings before the Comm. on Int. and Ins. Affairs, Senate, 83rd Cong., 1st Sess. on S. 1901, Outer Continental Shelf (1953) at 405-07.

[47]15 U.S.T. 473, TIAS 5578 (1953).

[48]16 U.S.C. §1801 et seq. (1976).

States. Under *Ray,* appellants are confessed trespassers against the United States.

If appellants have a valid legal argument on this sole ground, a brief analysis of the Outer Continental Shelf Lands Act legislative history will reveal that it is an argument which is bound up in international law and the rationale of the "tidelands" cases. Insofar as the activities of fishermen are concerned, it is the Fisheries Conservation and Management Act and not the Outer Continental Shelf Lands Act which expresses the policy of the United States. The Alaskan king crab is squarely with the coverage of the new Act. 16 U.S.C. §1802(4). Appellants are arguing on an "issue" which, pragmatically, has ceased to exist. Under this court's pragmatic approach to jurisdiction, little reason exists to consider the issue.

Finally, the decision below has no national impact whatsoever. Whatever impact the decision may have had has already been superseded by an Act of Congress. A whole new federal regimen for regulation of this and other off-shore fisheries has been established and is in the process of implementation. It is that new program, and not the challenged decision, which will have a national impact.

CONCLUSION

This court has jurisdiction to hear and decide questions raised on a final judgment from the highest state court from which review may be obtained. This court has not applied to final judgment rule in a

purely mechanical fashion but has established a number of categories of cases wherein it will review the decisions of the state courts which are not technically final. In most, if not all of these cases however, the additional proceedings will not require the resolution of other federal questions that might also require review by this court at a later date.

Appellants' case presents numerous federal and state issues which if disposed of would avoid the necessity of this court's review of the issue before it. Appellants' case also presents numerous federal issues which might also require this court to take review at a later date. Moreover even if this appeal did not have infirmities, it cannot be considered a final judgment because it does not fall within any of the categories of cases in which this court will review an interlocutory state court decision.

The Alaska Supreme Court's decision does not present issues of conflict among lower federal courts and it especially does not conflict with the opinion of the United States District Court for Alaska which has reviewed the regulations and the decision in issue. Likewise any concern of the United States should have been alleviated by Alaska's acknowledgement that the state law does not apply to the activities of foreign fishermen. The issue that appellants raise that has not been firmly decided by this court (exclusive jurisdiction under OCSLA) is one which has, in all effect, been resolved as to future controversies by the recent passage of the Fishery Conservation and Management Act.

Appellants have tried to inflate a controversy which, prior to the enactment of the Fishery Conservation and Management Act, had the potential for becoming a matter of some national importance. However, that importance has since passed. If appellants have justifiable legal claims they should and shall have the opportunity to present those claims to this court at the proper time, when there has been a final judgment that disposes of all of their state and federal claims. At that time this court will be able to determine their rights, if any, in this matter.

This appeal should be dismissed on the grounds that it is not within the jurisdiction of this court and it should not be considered in the alternative as a petition for certiorari.

Dated, August 9, 1976.

Respectfully submitted,

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(Appendix A Follows)

APPENDIX A

Appendix A

In the United States District Court
for the District of Alaska

Civil Action No. A-191-73

Severin Hjelle, et al., Plaintiffs,

vs.

James W. Brooks, et al., Defendants.

[Filed June 11, 1976]

OPINION

Before: WRIGHT, Circuit Judge, and VON DER HEYDT and PLUMMER, District Judges

PLUMMER, Senior District Judge:

Plaintiffs, a group of commercial king crab fishermen, seek injunctive and declaratory relief to prevent enforcement against them by the State of Alaska of State fishing regulations in the Bering Sea outside of three miles from Alaska's coastline.[1] The regulations in effect at the time this suit was commenced[2] were

[1]The regulations are 5 AAC 34.005, 34.020, 34.030, 34.035, 34.040, 34.050, 34.060, 34.070, 34.085, 34.090, 34.095, 34.096, 34.097, 34.900, 34.910, 34.915, and 34.920(a). Plaintiffs also seek a declaration of invalidity of A.S. 16.10.190, 16.10.200 and 16.10.210 insofar as said statutes purport to authorize the regulation of plaintiffs fishing for king crab in the Bering Sea.

[2]5 AAC 07.760 and 36.040.

repealed after we issued our prior opinion enjoining their enforcement. *Hjelle v. Brooks,* 377 F.Supp. 430 (D.Ak. 1974). After repealing the old regulations, the State adopted emergency interim regulations on May 9, 1974, and then the current regulations on June 15, 1974. We refused to enjoin the emergency regulations because of their possible validity under a rationale we suggested in *Hjelle.*[3] Thereafter, on July 15, 1974, the State filed criminal charges against seven crab fishermen who are plaintiffs in this federal action for violation of the new regulations. The third amended complaint, challenging the regulations cited in note 1, was filed July 31, 1974, fifteen days after the criminal charges were filed. Since then, the state and the federal actions have proceeded independently until we granted a stay of our proceedings at the parties' request pending the decision of the Alaska Supreme Court in the state proceeding.[4]

On January 19, 1976 the Supreme Court of Alaska issued its opinion in *State v. Bundrant,* 546 P.2d 530 (Ak. 1976). The petition for rehearing was denied March 26, 1976, 547 P.2d 838. In *Bundrant* the Alaska Supreme Court reversed the state trial court's dismissal of the criminal charges brought against seven

[3]At 377 F.Supp. 441 we stated (emphasis in original):
"[Alaska's] regulation of certain extraterritorial conduct would pass constitutional muster if its regulations were directed at conserving the crab fishery *within* Alaska's waters by regulating crabbing in that area and, *in order to facilitate enforcement,* by prohibiting the possession of crab in the state during the closed season, even if that crab were caught outside the state."

[4]Defendants' closing argument, page 8, filed September 26, 1975; plaintiffs' reply argument, page 6, filed October 9, 1975.

crab fishermen. The decision upholds the constitutionality of the regulations under which the fishermen were charged, and which are in issue here.

The question now presented is whether this court should make a second determination of the constitutional validity of the State's Bering Sea king crab regulations. For the reasons that follow, we think that this court should not do so. Accordingly, we dismiss as to all plaintiffs and all claims. We rely chiefly on rationales developed in cases relating to abstention.

Abstention by a federal court when there is a pending state criminal prosecution is governed by *Younger v. Harris,* 401 U.S. 37 (1971), and subsequent Supreme Court cases. *Younger* provides that equitable relief in federal court is not available to interfere with a pending state criminal proceeding absent bad faith harassment by the state officials. In our case, only seven of the federal plaintiffs are involved in pending state criminal proceedings. Normally, each federal plaintiff is treated individually for purposes of abstention. *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 928 (1975); *Steffel v. Thompson,* 415 U.S. 452, 471 note 19, (1974). Accordingly, absent other factors, the criminal proceedings against the seven state defendants should not be imputed to the other thirty-seven federal plaintiffs. However, when there is sufficient "joint activity and common interest" abstention may be justified even as to those federal plaintiffs who are not state defendants. *Allee v. Medrano,* 416 U.S. 802, 832 n.8, 831-832 (1974) (Burger, C.J. concurring).

Hicks v. Miranda, 422 U.S. 332, 348-349 (1975); *Sole v. Grand Jurors For the Counties of Possaic and Bergen,* 393 F.Supp. 1322, 1329 n.12 (D.N.J. 1975). In this case, there is such joint activity and common interest.

To lightly impute state prosecution to a federal plaintiff not a party thereto would obviously frustrate the policies announced in *Steffel, supra,* and *Dombroski v. Pfister,* 380 U.S. 479 (1965). Yet in this case the pleadings and testimony of plaintiffs so clearly demonstrate the "joint activity and common interest" of all plaintiffs that we believe imputation is proper.

Severin Hjelle, by affidavit filed June 17, 1974, stated that:

> "[t]his action was originally commenced . . . on behalf of the members of the North Pacific Vessel Owners Association [NPVOA]."

By supplemental memorandum filed June 21, 1974, plaintiffs indicated that they had

> "now included as parties all non-resident members of the [NPVOA] who are prepared to commence fishing in the Bering Sea on June 26, 1974."

Hjelle's affidavit also indicated that he was President of the NPVOA as of June 17, 1974. Apparently Hjelle's incumbency expired sometime thereafter, for at trial Konrad Uri, a federal plaintiff and state defendant, testified that he was President of the NPVOA.

In an affidavit of May 23, 1974, Hjelle stated:

> "To avoid a complete lack of management for the Bering Sea king crab fishery, the individual members of the [NPVOA], now comprising some 42 vessel operators and the seven processors who purchase the vast majority of king crab caught in the Bering Sea have formed an organization called the Shellfish Conservation Institute. The institute has adopted regulations . . . which honor the treaty restrictions on the capture of king crab and, in addition, [has] proposed to commence the king crab fishing season in the Bering Sea on June 26, 1974."

Hjelle's June 17 affidavit explained how individual fishermen looked to the Shellfish Conservation Institute for guidance in pursuing their work:

> "All plaintiffs in this case stand ready to commence fishing in the Bering Sea on or before June 26, 1974, *as specified in the industry regulation* of the Shellfish Conservation Institute and will suffer irreparable harm if not permitted to do so." (Emphasis added)

In a telegram attached as an exhibit to plaintiffs' third amended complaint, the Alaska Fish and Game Commissioner recognized as a "flagrant challenge of authority":

> "the announcement by the Shellfish Conservation Institute that it had adopted king crab fishing regulations on the basis that it did not recognize the regulations and jurisdiction of the State of Alaska . . . ."

The most recent indication of the joint nature of the state and federal proceedings is the agreement by

all federal plaintiffs, including those not under state indictment, to a stay of the federal proceedings pending the decision of the Alaska Supreme Court.

While the numerous federal plaintiffs own their vessels and gear individually rather than collectively, it is clear to us that they are all so closely related in terms of "control and management" (*Doran,* 442 U.S. at 928), that application of the "imputation" principle is proper.[5] The participation of Konrad Uri,

[5]We perceive the facts before us as placing this case somewhere between *Steffel* and *Allee.*

In *Steffel,* the federal plaintiff was not a state defendant, although his handbilling companion was. It was precisely this relationship which enabled Steffel to overcome the case or controversy requirement. 415 U.S. at 458-60. According to Chief Justice Burger, concurring in *Allee:*

> "There was no indication in [*Steffel*] that the petitioner and the arrestee were associated otherwise than in the distribution of antiwar handbills. Furthermore, in *Steffel,* the petitioner departed to avoid arrest while his companion in handbilling stayed. The joint activity of petitioner and his companion in *Steffel* ceased prior to the arrest of the companion. Finally, there is no indication that the arrestee would seek to or be able to vindicate petitioner's rights in the criminal proceeding. . . ."

416 U.S. at 831 (Burger, C.J., concurring.).

In *Allee, all* individual federal plaintiffs were subject to state prosecution. 416 U.S. at 821-26, 830-32 (Burger, C.J., concurring). Thus the Chief Justice noted that the union with which the individual parties were associated should not be able to surmount *Younger* obstacles which could not be overcome by its individual members. *Id.* at 830-31.

The situation such as that before us was considered by the Chief Justice, who suggested:

> "There is no need to attempt to further define those situations in which it would be proper to impute the state criminal prosecution of one who is not a federal plaintiff to one who is. The association of the state criminal defendant and the federal plaintiff necessary for imputation will depend upon facts of joint activity and common interest."

Allee, supra, 416 U.S. at 832 n.8 (Burger, C.J., concurring). The case before us is a somewhat stronger one for imputation than is the hypothetical one described above, since here seven of the 44 federal plaintiffs are state defendants.

President of the NPVOA, in the state proceeding gives the federal plaintiffs the "assurance that those presently being prosecuted will challenge the constitutionality of the regulations." Accordingly, in the discussion that follows, we will treat all federal plaintiffs identically.

One possible ground for invoking *Younger* abstention is that the state criminal proceedings, begun on July 15, 1974, were commenced prior to the filing of the third amended complaint, filed July 31, 1974. By treating the third amended complaint as a new cause of action, we would be within *Hicks v. Miranda,* 422 U.S. 332 (1975), which requires abstention if the state criminal charges are brought before any federal proceedings of substance on the merits. Although we may have discretion to so interpret the third amended complaint, compare *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218, 226-227 (1964) with *Cherry v. Morgan,* 267 F.2d 305 (C.A. 5 1959), we decline to do so. Instead we look to the plaintiffs' own actions.

Prior to our issuance of a stay this case was near its conclusion. The trial had been held and proposed findings and final written arguments had been submitted. Thereupon, at pages 7 and 8 of defendants' closing argument the following statement and proposal was made:

> "Although the Court need not dismiss this action on abstention grounds, the imminence of a ruling by the Alaska Supreme Court in the related criminal cases would warrant a stay of this action until the State cases are resolved. The

> briefs filed in those cases demonstrate that the same parties have through the same counsel presented many of the same legal arguments. Those arguments have been through the refining process of trial court adjudication and are expected by all to be resolved on appeal shortly. Needless to say, the State is hopeful of success in those cases, and we are confident that the fishermen will honor the Alaska Supreme Court's rulings. Accordingly, principles of comity would be served by a temporary stay of this proceeding pending the Alaska Supreme Court's decision, following which this Court could entertain motions to dismiss this action or such further briefing as may be desired."

Plaintiffs concurred in this proposal. While not calling their agreed procedure "abstention," the parties did agree on principles of comity to a stay of the federal proceeding until the state court could rule. The stay was granted and the Alaska Supreme Court has ruled. The question is whether a party can voluntarily seek a prior state court ruling on his claim and then reapply to a federal court if the state ruling is adverse, rather than pursue his state court remedies.

Two United States Supreme Court cases control the resolution of this problem. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964); *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975). *England* involved *Pullman*[6] rather than *Younger* ab-

[6] *Railroad Commission of Texas v. Pullman Company,* 312 U.S. 496 (1941).

stention, but it is relevant because a pending federal case was interrupted by a state court determination of the merits of the federal claim, similar to our case. *Huffman* involved *Younger* abstention and shows the effect of a state court decision on concurrent proceedings in federal court.

In *England* the three-judge district court abstained because of the presence of uncertain issues of state law. Both the state and federal issues were submitted to the state court which ruled adversely to the federal plaintiffs on each. When they returned to the district court, plaintiffs' claims were dismissed on grounds of res judicata and full faith and credit. 194 F.Supp. 521 (E.D. La. 1961). On review by the Supreme Court, it held that federal plaintiffs were not required to submit to the state court the federal issue, but were only required to inform the state court of the issue so that the state could construe state law in light of federal constitutional questions. Resolution of the federal issue could be expressly reserved to the federal forum by not submitting it to the state court. Thus, the Supreme Court preserved federal plaintiff's choice of a federal forum to resolve his federal claim. The Court did not, however, reserve to the federal plaintiff the right to have the matter resolved twice. At 375 U.S. 419 the Court stated:

> "But we see no reason why a party, after unreservedly litigating his federal claims in the state courts, although not required to do so, should be allowed to ignore the adverse state decision and start all over again in district court."

If this language is directly applicable to our case, then federal plaintiffs have waived their rights to a determination by us of the merits of their federal claim. However, there are substantial differences between *Pullman* and *Younger* abstention and blind cross-application of principles is unwarranted. For a distinction, see *Huffman v. Pursue,* 420 U.S. 592, 616 n.2 (1975) (Brennan, J. dissenting). But there are similarities. Here, federal plaintiffs were not required to request a stay of the federal proceedings in order to allow the state court to rule. By doing so they unreservedly litigated their federal claims in state court when not required to do so. Thus, their reapplication to our court is similar to the situation in *England* where the Supreme Court held that a litigant is not entitled to two chances on his federal claim.

Even if the above language is not directly applicable, nevertheless *England* is helpful in other aspects. The reason that the Court allowed the plaintiff to preserve his right to return to federal court by reserving the federal issue from the state court was to preserve plaintiff's right to choose a federal forum for his federal claim. "The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." 375 U.S. 415 quoting *Wilcox v. Consolidated Gas Co.,* 212 U.S. 19, 40 (1909). The major justification for preserving the federal district court forum is to preserve federal fact finding. "It is the typical, not the rare, case in which constitutional claims turn upon resolution of

contested factual issues." 375 U.S. at 416-417 quoting *Townsend v. Sain,* 372 U.S. 293, 312 (1963). But where the state proceeding is criminal, federal fact finding is preserved through habeas corpus. At note 8, 375 U.S. 417, the court states:

> "Even where fact findings on federal constitutional contentions are for state tribunals to make in the first instance, as in state criminal prosecutions, they are not immune, when brought into question in federal habeas corpus, from District Court consideration and, in proper cases, from *de novo* consideration. *Townsend v. Sain,* 372 U.S."

Thus, the reason for allowing the federal plaintiff immediately to return to the abstaining federal court after a state decision is lacking where the state proceeding is criminal and habeas corpus available. Federal fact finding is preserved in other ways.

Implicit in all of this is that after *Younger* abstention a federal plaintiff should not reserve his federal claim or defense, but should unreservedly submit it to the state court. Once having done so, he cannot immediately return to federal court after an adverse ruling, but must pursue his remedies by appeal and habeas corpus. He cannot return to the three-judge district court that abstained, at least not until the state proceeding is final.

The other guiding case in our decision is *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975). It involved a civil nuisance action by the State of Ohio seeking to close a theatre for exhibiting pornographic movies.

The Court held that this proceeding was sufficiently similar to a criminal prosecution to be within the limitations of *Younger*. The federal plaintiff sought to distinguish the nuisance action because of the non-availability of habeas corpus. The Court replied at 420 U.S. 606 (emphasis in original):

> "Appellee's argument, that because there may be no civil counterpart to federal habeas it should have contemporaneous access to a federal forum for its federal claim, apparently depends on the unarticulated major premise that every litigant who asserts a federal claim is entitled to have it decided on the merits by a federal, rather than a state, court. We need not consider the validity of this premise in order to reject the result which appellee seeks. Even assuming, *arguendo,* that litigants are entitled to a federal forum for the resolution of all federal issues, that entitlement is most appropriately asserted by a state litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state court proceedings. We do not understand why the federal forum must be available prior to completion of the state proceedings in which the federal issue arises, and the considerations canvassed in *Younger* militate against such a result."

In the succeeding paragraphs the Court may have undercut the premise of the right to a federal court forum. But to the extent that there is such a right, the majority felt that it arises at the termination of the state court proceedings.

The three dissenting justices did not agree that *Younger* was applicable. But they implied that where

Younger abstention is applicable federal relief is not available until the termination of the state proceedings. At note 2, 420 U.S. 616, Mr. Justice Brennan discussed this point:

> "Abstention where authoritative resolution by state courts of ambiguities in a state statute is sufficiently likely to avoid or significantly modify federal questions raised by the statute is another matter. Abstention is justified in such cases primarily by the policy of avoidance of premature constitutional adjudication. The federal plaintiff is therefore not dismissed from federal court as he is in *Younger* cases. On the contrary, he may reserve his federal questions for decision by the federal district court and not submit them to the state courts. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). Accordingly, retention by the federal court of jurisdiction of the federal complaint pending state court decision, not dismissal of the complaint, is the correct practice. *Lake Carriers' Assn. v. MacMullan,* 406 U.S. 498, 512-513, 92 S.Ct. 1749, 1758, 32 L.Ed.2d 257 (1972)."

If *Younger* abstention requires dismissal, as the quotation indicates, the federal plaintiffs' only remedies are to appeal the state court ruling and habeas corpus. Both remedies come after the termination of the state court proceedings. Thus, in the dissenters' view, as in the majority's, to the extent that there is a remedy, it comes after the state court decision is final.

The state has raised the issue of the res judicata and collateral estoppel consequences of the Alaska

Supreme Court decision. Because of our holding that the consequences of abstention prevent relitigation of the merits of plaintiffs' claims at this time, we need not consider the applicability of res judicata and collateral estoppel. It is not an issue entirely free from doubt. *Huffman, supra,* 420 U.S. at 607, note 19. See *Thistlethwaite v. City of New York,* 497 F.2d 339 (2nd Cir. 1974); *Goodrich v. Supreme Court of South Dakota,* 511 F.2d 316 (8th Cir. 1975). Compare the res judicata implications had a declaratory judgment been rendered by this court. *Steffel v. Thompson,* 415 U.S. 452, 470 (Brennan for the Court), 477 (White concurring), 482 (Rehnquist concurring) (1974). The reversal and remand by the Alaska Supreme Court may not be a final decision for res judicata purposes. *East Bay Union of Mach., Local 1304 v. Fiberboard Products Corp.,* 285 F. Supp. 282 (N.D. Cal. 1968) aff'd. 435 F.2d 556 (9th Cir. 1970). Because resolution of these complex questions is not necessary under our reasoning, we will not do so at this time.

In essence, what has happened in this case is abstention by stipulation. We see no difference between the consequences of abstention by agreement of the parties or by order of the court. In either case federal review of the state decision is postponed until the state proceedings are final. We do not sit as a court of appeals to review the decision of the Alaska Supreme Court.

For the reasons stated, the third amended complaint is dismissed as to all federal plaintiffs. The injunctive order issued by this Court on May 16, 1974, is now vacated. All prior controversy is declared moot.

/s/ Raymond E. Plummer
Raymond E. Plummer
Senior United States District Judge

/s/ James A. von der Heydt
James A. von der Heydt
United States District Judge

Dated: 6/11/76

WRIGHT, Circuit Judge, concurring in the result.

The res judicata and collateral estoppel effects of the final decision[1] of the Alaska Supreme Court in *State v. Bundrant,* 546 P.2d 530 (Ak. 1976), require that we dismiss the federal complaint as to those seven federal plaintiffs who are parties defendant in the state criminal proceeding.[2]

I agree with the analysis of the majority imputing the state criminal prosecution to the remaining 37 federal plaintiffs. While the relationship between the seven and the 37 is not such that the doctrines of res judicata and collateral estoppel should be applied to

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[1]The fact that only three of five Alaska Supreme Court Justices participated in *Bundrant* does not detract from the precedential value of that decision. *Cf.* Recent Cases, 86 Harv. L. Rev. 1307 (1973); Comment, 50 Wash. L. Rev. 901, 907 & n.42 (1975).

[2]The constitutional issues raised in the third amended federal complaint are the same as those decided by the *Bundrant* court. There is identity of parties as to the seven federal plaintiffs who are also state defendants in *Bundrant*. The federal defendants are in privity with the State of Alaska, the state plaintiff. Therefore, the estoppels are mutual.

those federal plaintiffs who are not state defendants, the relationship is sufficiently close to apply *Younger* principles to all federal plaintiffs.

I would treat the third amended complaint as a new claim, filed after the promulgation of new state regulations and commencement of state criminal proceedings pursuant to them.[3] *Younger* teaches that we must dismiss the third amended complaint as to all federal plaintiffs deemed subject to the state criminal proceeding.

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[3]Plaintiffs' third amended complaint is actually a "supplemental pleading," since it "[sets] forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Fed. R. Civ. P. 15(d). The repeal of a statute, regulation or ordinance the enforcement of which has been previously enjoined, followed by enactment of a new measure, is a typical situation calling for the filing of a supplemental pleading. *See, e.g., Griffin v. County School Board of Prince Edward County,* 377 U.S. 218, 226-27 (1964).

While an amended complaint is not ordinarily regarded as a new "cause of action," this supplemental pleading should be. *Compare Cherry v. Morgan,* 267 F.2d 305, 305-06 (5th Cir. 1959). (But this does not preclude us from entertaining the supplemental pleading in the same lawsuit. *Cf. Rowe v. United States Fidelity and Guaranty Co.,* 421 F.2d 937, 942-44 (4th Cir. 1970). The need to avoid multiplicity of lawsuits, evidenced by ancillary and pendent jurisdiction doctrine, and by rules allowing liberal pleading and joinder of claims, supports a policy of freely admitting supplemental claims. *See Case-Swayne Co. v. Sunkist Growers, Inc.,* 369 F.2d 449, 462 (9th Cir. 1966), *rev'd on other grounds,* 389 U.S. 384 (1967). *See generally* 6 C. Wright & A. Miller, Federal Practice and Procedure § 1506 (1971); 3 J. Moore, Federal Practice ¶ 15.16[3] (2d ed. 1975).)

Plaintiffs argue, however, that the new state regulatory scheme, adopted June 15, 1974, is "simply a subterfuge and a flagrant violation of the outstanding injunction." *Compare Griffin,* 377 U.S. at 276-77. This suggests that the third amended complaint is not a new "cause of action" at all.

Such a suggestion, if accepted, would support the conclusion that "proceedings of substance on the merits [had] taken place in the federal court" prior to the July 15, 1974 filing by the state of its criminal complaint. *Hicks v. Miranda,* 422 U.S. 332, 349 (1975). In that event, Younger principles would not prevent this court from entertaining the third amended complaint.

However, I cannot agree with plaintiffs' premise. Scrutiny of the new regulations demonstrates that Alaska has sought to follow the suggestions in our prior opinion, 377 F. Supp. at 441. *See* 5 Alaska Admin. Code §§ 34.005, -.030, -.035, -.085, -.098.

While this new regulatory scheme implements the same purpose as that underlying the regulations whose enforcement we previously enjoined, the means employed here are different. *Compare Hjelle,* 377 F. Supp. at 432-33, *with Bundrant,* 546 P.2d at 533-34; *id.* at 558 (Rabinowitz, J., concurring). Where, as here, the state has made a conscientious effort to tailor its regulations to the language of the prior opinion of this court, there is no "subterfuge" or "flagrant violation" of our prior ruling. Rather, Alaska is engaged here in legitimate legislative experimentation. The situation in *Griffin, supra,* is in stark contrast.

Thus, I would treat the third amended complaint, actually a supplemental pleading, as the equivalent of a new claim challenging the regulations of June 15, 1974.

The Alaska court in *Bundrant* ruled in favor of the state with respect to the same constitutional claims as those presented in this federal action. Thus, there apparently remains no "adequate remedy at law" in the state system with respect to those constitutional claims. *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 601 (1975). In the absence of an adequate legal remedy, an equity court normally need not stay its hand.

However, the *Younger* doctrine is based not merely upon general equitable principles, but also upon

> . . . an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . [T]he National Government, anxious though it may be to vindicate and protect federal

> rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44 (1971), quoted in *Huffman, supra,* 420 U.S. at 601.

The Alaska court remanded the cause in *Bundrant* so that "the State may proceed to enforce its crab regulations" against the defendants. 546 P.2d at 556. The criminal trial on the merits is pending.

Federal plaintiffs mount a facial constitutional attack on Alaska's crab regulations and authorizing statutes. Were we to grant either declaratory or injunctive relief, our judgment would necessarily prevent any and all enforcement of those statutes and regulations. Thus, a judgment in favor of any of the federal plaintiffs would preclude the state from prosecuting the parties-defendant in *Bundrant*. Such a result would "unduly interfere with the legitimate activities" of the State of Alaska, and thereby violate the principles announced in *Younger* and its progeny.

For these reasons, I agree that the third amended complaint should be dismissed as to all federal plaintiffs.[4]

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[4]Unlike the majority, I would not rely on an "abstention by stipulation" rationale to dispose of this action. It is not clear to me that by requesting a stay pending decision in *Bundrant* those federal plaintiffs who are *not* state defendants have "unreservedly litigated their federal claims in state court. . . ." (Majority opinion at 7.)